MOTION FILED
DEC 1 2 1996

(3)

No. 96-685

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE and LYLA C. WEESE, Individually and as Class Representatives on Behalf of all Persons Similarly Situated,
Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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12 pp

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MOTION FOR LEAVE TO FILE BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Tangier Sound Waterman's Association (the "Association") hereby respectfully requests leave to file the attached brief as *amicus curiae* in Support of the Petition for Certiorari. Counsel for respondent has refused to consent to the filing of the attached brief.

The Association is an unincorporated group of about 80 commercial fishermen who live in Maryland. Many of the Association's members have been victims of the discriminatory burdens imposed by non-resident fishing fees, such as those in this case, because they must pay a non-resident fee in order to fish in Virginia. In addition, the Association has long been concerned that states do not impede the fundamental rights of

fishermen to engage in their livelihood without discriminatory regulations. The interest of the Association as *amicus curiae* is described in greater detail *infra* at Brief, pp. 1-2.

The Association requests that this Court grant this motion for two primary reasons. First, the Association has experience with discriminatory non-resident fees such as those in this case and believes that its discussion of the issues will benefit the Court. The Association has participated in two cases involving discrimination against non-resident commercial fishermen. *See Tangier Sound Waterman's Association v. Pruitt*, 4 F.3d 264 (4th Cir. 1993); *Tangier Sound Watermen's Association v. Virginia*, 541 F. Supp. 1287 (E.D. Va. 1982).

Second, the members of the Association have a strong interest in these issues and wish to address the implications of this case for fishermen across the country. Unconstitutional non-resident fishing fees are widespread and often prohibitively high. Unfortunately, fishermen often lack the financial resources necessary to pay or challenge non-resident fees. Because of its experience in this area, the Association would like to comment on these issues for the benefit of the Court.

Wherefore, the Association respectfully requests that this Court grant its Motion for Leave to file this brief *amicus curiae*.

Respectfully submitted,

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December 12, 1996

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BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTORY STATEMENT

This brief is submitted by the Tangier Sound Waterman's Association as *amicus curiae* in support of the Petitioners.

INTEREST OF *AMICUS CURIAE*

The Tangier Sound Waterman's Association (the "Association") is an unincorporated association of about 80 commercial fishermen residing in Maryland in communities on Smith Island and in the vicinity of Crisfield, Maryland, on the Eastern Shore of the Chesapeake Bay. Smith Island is located at approximately the center of the Chesapeake Bay and is transected at its southernmost tip by the boundary between Maryland and

Virginia. The Association's members harvest the many species of edible fish, crabs and shellfish in the waters of the Chesapeake Bay and its tributaries.

The Association has long been concerned with discrimination against non-resident commercial fishermen. Prior to 1982, Virginia prohibited all non-residents from commercial fishing within Virginia's territorial waters. In *Tangier Sound Watermen's Association v. Virginia,* 541 F. Supp. 1287 (E.D. Va. 1982) ("*Tangier I*"), the District Court for the Eastern District of Virginia held that Virginia's prohibition on all non-resident fishing was unconstitutional. In 1983, in reaction to the decision, the Virginia legislature imposed a fee of $350 upon non-residents engaging in commercial fishing within the Commonwealth of Virginia.

In 1991, Virginia tripled its non-resident commercial fishing fee to $1,150 per boat. Va. Code §§ 28.1-47.1, *as amended* (1991). The Association successfully challenged this fee as violating the Privileges and Immunities Clause of the United States Constitution. *Tangier Sound Waterman's Association v. Pruitt,* 4 F.3d 264 (4th Cir. 1993) ("*Tangier II*"). After the decision in *Tangier II*, Virginia's General Assembly passed another statute authorizing the Virginia Marine Resources Commission (the "Commission") to establish a fee "no less than $350 or more than $1,150." Va. Code § 28.2-227, *as amended* (1993). Since 1993, the Commission has charged a $350 non-resident fee. Like the prior $350 non-resident fee, the fishermen have not challenged the present fee of $350 because it is economically prohibitive for them to do so.

Many of the Association's members harvest fish in Virginia, reside in Maryland near the Virginia boundary, and thus have a particular interest in non-resident fishing fees. In addition, the Association is concerned that states do not impede, through non-resident fees, the fundamental rights of fishermen to engage in their livelihood without suffering the burden of unreasonable and discriminatory regulations. If not reviewed by this Court, the decision in this case will encourage other states to discriminate

against non-residents by enacting or increasing non-resident commercial fishing fees in disregard of the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

STATEMENT

This case involves Privileges and Immunities Clause and Commerce Clause challenges to Alaska's non-resident commercial fishing fees. Given the tendency of States to favor their own residents over non-residents who cannot vote, parochial and discriminatory non-resident fees are a common burden and often a total barrier for commercial fishermen. Non-resident fees such as those imposed in this case are clearly unconstitutional under the Privileges and Immunities Clause and the Commerce Clause.

ARGUMENT

I. THERE ARE COMPELLING REASONS FOR GRANTING THE WRIT

The questions raised by the Petitioners in this case merit this Court's review. States have a tendency and incentive to favor their own citizenry and industry over those of other States. The desire to prevent the states from taxing each other was one of the driving forces behind the Constitution. Repeatedly in *The Federalist Papers,* the founders argued in favor of the Commerce and Privileges and Immunities Clauses to limit the "unbridled spirit [in] regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens" and "the desire of the commercial States to collect in any form, an indirect revenue from their uncommercial neighbors." *The Federalist Papers,* Nos. 7 and 42 (G. Wills ed. 1982) at 30 and 214.

Despite the Privileges and Immunities Clause, the Commerce Clause and the body of caselaw finding that there is no substantial reason for discriminating against non-residents trying to earn a living in the commercial fisheries, states continue to maintain discriminatory commercial fishing fees based upon state

residency. For example, despite this Court's decision in *Mullaney v. Anderson,* 342 U.S. 415 (1952), Alaska continued to levy higher fees for non-resident commercial fishermen. After the court struck down Virginia's absolute prohibition on non-resident fishermen in *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982), Virginia immediately implemented a non-resident fee of $350. When that fee did not keep out non-residents, Virginia tripled the fee to $1,150. After the Fourth Circuit held that Virginia's $1,150 fee violated the Privileges and Immunities Clause in *Tangier II*, 4 F.3d 264 (4th Cir. 1993), Virginia authorized yet another non-resident fee. Va. Code § 28.2-227, *as amended* (1993). At least nineteen other States discriminate against commercial fishermen by imposing non-resident fees. *See* Petition for Certiorari at fn. 20.

This unconstitutional discrimination is pervasive because there are real and significant impediments to challenging non-resident fees. Commercial fishermen usually operate independently and tend to be loosely organized, if at all. Even when fishermen are organized, they often lack the financial resources necessary to mount a legal challenge against a state. Non-resident fishermen are helpless to change the laws through the political process in states where they do not reside. As a result, commercial fishermen across the country continue to pay unconstitutional fees. Given these national implications, the Petition for Certiorari should be granted.

II. THE DECISION OF THE SUPREME COURT OF ALASKA DIRECTLY CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS CONSIDERING THE ISSUE OF NON-RESIDENT COMMERCIAL FISHING FEES

In contrast to the Supreme Court of Alaska, this and other courts have consistently held that non-resident fishing fees violate

the Privileges and Immunities Clause.[1] The leading case is *Toomer v. Witsell*, 334 U.S. 385 (1948), in which this Court held that South Carolina's $2,500 fee for non-resident shrimp fishermen violated the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385, 399 (1948). Following *Toomer*, the Court in *Steed v. Dodgen*, 85 F. Supp. 956 (W.D. Tex. 1949), enjoined the State of Texas from enforcing a non-resident license fee of $200 per person compared to a $3 fee for a resident, and a non-resident license fee of $2,500 per boat compared to $3 or $15 for a resident. The Court found that the non-resident licenses were based solely on citizenship, and that there was no substantial reason for the discrimination:

> The resident and the non-resident commercial fishermen are engaged in the same common calling, using substantially the same means and methods; and there is not shown to be any real distinction between the fishing vessels owned and used by resident commercial fishermen and those owned and used by non-resident commercial fishermen.

Steed, 85 F. Supp. at 957-958.

This Court again addressed the issue of non-resident fishing fees in *Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Mullaney*, the then territory of Alaska imposed a $5 license fee on resident fishermen and a $50 fee on non-residents. This Court

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[1] Outside the area of commercial fishing, the Courts have likewise repeatedly invalidated State laws discriminating against non-residents trying to earn a livelihood. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia's requirement that only Virginia residents could become admitted to the State's bar without examination violates the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (Alaskan statute requiring preferential hiring of Alaskans over non-residents violates the Privileges and Immunities Clause); *O'Reilly v. Board of Appeal for Montgomery County, Maryland*, 942 F.2d 281 (4th Cir. 1991) (Privileges and Immunities Clause invalidates County's taxi license requirements favoring drivers familiar with County).

held that Alaska's discriminatory fees violated the Privileges and Immunities Clause. Other cases striking down non-resident commercial fishing fees are *Tangier II*, 4 F.3d 264 (4th Cir. 1993) (Virginia's $1,150 non-resident fee violated Privileges and Immunities Clause), and *Gospodonovich v. Clements*, 108 F. Supp. 234 (E.D. La. 1951) (non-resident fishing fees held invalid under Privileges and Immunities Clause).[2]

Non-resident commercial fishing fees violate the Commerce Clause as well as the Privileges and Immunities Clause. Contrary to the holding of the Supreme Court of Alaska in this case, there can be no doubt that commercial fishing is an aspect of interstate commerce. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281-282, n. 16-18 (1977). The only purpose served by these non-resident fees is economic protectionism designed to favor the residents of the home state over other United States citizens. Otherwise states would adopt evenhanded restrictions and fees that would apply equally to residents and non-residents. Such protectionist barriers to interstate commerce are plainly beyond the scope of permissible state regulation under the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 114 S.Ct. 1345 (1994).

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[2] The Courts have also invalidated state laws restricting commercial fishing grounds based upon state residency. *See Brown v. Anderson*, 202 F. Supp. 96 (D. Alas. 1962) (Alaska may not close commercial fishing areas to non-residents); *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982) (prohibition against non-resident commercial fishermen violates Privileges and Immunities Clause).

CONCLUSION

For the reasons set forth above, the Tangier Sound Waterman's Association respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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